APPEAL NO. 041526
FILED AUGUST 16, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was scheduled for March 4, 2004, but was continued to and held on May 18, 2004. The hearing officer determined that the appellant (claimant) has an impairment rating (IR) of eight percent, as certified by the required medical examination (RME) doctor. The claimant appeals this determination. In his appeal, the claimant asserts that the hearing officer erred by failing to grant his second request for continuance and entering a default judgment. The respondent (carrier) responds, asserting that the claimant's appeal does not invoke the jurisdiction of the Appeals Panel. In the alternative, the carrier urges affirmance.

DECISION

Reversed and remanded.

We first address the carrier's assertion that the claimant's appeal does not invoke the jurisdiction of the Appeals Panel. The carrier contends that the appeal is insufficient because "the [Texas Workers' Compensation Commission (Commission)] had no records that [Mr. A] or the [law] firm of (law firm) had been retained as counsel for the [c]laimant." In a letter dated May 18, 2004, admitted as Hearing Officer's Exhibit No. 4, the above referenced attorney filed a letter, stating "We can and will accomplish a contract and a letter of representation by the end of this week." Under these circumstances, we are satisfied that the appeal is sufficient to invoke the jurisdiction of the Appeals Panel.

As stated above the claimant asserts that the hearing officer erred by failing to grant his second request for continuance. Section 410.155(b) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.10(b)(2) (Rule 142.10(b)(2)) provide that the Commission may grant a continuance of a scheduled hearing upon a showing of good cause. We have said that the test for the existence of good cause is whether the claimant acted as a reasonably prudent person would have acted under the same or similar circumstances. Texas Workers' Compensation Commission Appeal No. 94244, decided April 15, 1994. The record reflects that the original CCH was scheduled for March 4, 2004. The claimant requested a continuance in order to obtain legal counsel. The motion was granted and the hearing was rescheduled for May 18, 2004. Just 45 minutes prior to the hearing, the above referenced attorney urged a second request for continuance, stating that the claimant "had contacted my office several weeks ago" but that the attorney had only recently decided to accept the case. The hearing officer denied the request for continuance. Under the circumstances presented here, we cannot conclude that the hearing officer abused her discretion in denying the claimant's second request for continuance. Morrow v. H.E.B, Inc., 714 S.W.2d 297, 298 (Tex. 1986).

We recognize that neither the claimant nor his attorney were present at the CCH. To the extent the claimant attempts to argue that the hearing officer erred by proceeding in his absence, we note that the hearing officer issued a 10-day show cause letter in accordance with Commission precedent. *See* Texas Workers' Compensation Commission Appeal No. 032853, decided December 22, 2003. The record reflects that the claimant failed to respond in the time required. Accordingly, we perceive no error.

Notwithstanding the claimant's failure to appear, the hearing officer erred in determining that the claimant has an eight percent IR, as certified by the carrier's RME doctor. Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary. Rule 130.6(i) provides that the designated doctor's response to a request for clarification is considered to have presumptive weight as it is part of the designated doctor's opinion. The party who seeks to overcome the designated doctor's report has the burden of proof. Texas Workers' Compensation Commission Appeal No. 022333, decided October 28, 2002. In this case, the carrier argued that the designated doctor failed to properly apply the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides). Specifically, the carrier contended that the designated doctor's certification was duplicative in nature because it included ratings for loss of range of motion (ROM), loss of strength, and joint crepitation in the affected joint. The carrier also argued that the designated doctor failed to properly convert the claimant's individual impairments to a whole person IR in accordance with Section 3.1o, page 66, of the AMA Guides. We observe that the designated doctor's report was not offered or admitted into evidence in this case. Notwithstanding, the hearing officer found that the designated doctor did not base his certification on a correct application of the AMA Guides. We believe that the hearing officer could not properly determine whether the designated doctor's report was invalid or against the great weight of the evidence without at least having reviewed such report. Accordingly, we reverse and remand the hearing officer's decision for admission of the designated doctor's reports and further consideration of the issue presented. To ensure an adequate record on remand, the hearing officer should direct the designated doctor to explain why combined ratings for loss of ROM, loss of strength, and joint crepitation are appropriate in this case, if indeed such ratings were given by the designated doctor, and direct the designated doctor to justify his calculation of the claimant's whole person IR or recalculate the whole person IR in accordance with Section 3.1o, page 66, of the AMA Guides. The hearing officer should allow the parties an opportunity to respond to the designated doctor's clarification but should not reconvene the hearing or take any additional evidence on the issue, other than the designated doctor's reports, the designated doctor's clarification, and the parties' responses to such clarification.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new

decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **FAIRMONT INSURANCE COMPANY** and the name and address of its registered agent for service of process is

FRANK A. MONTEMARANO
5205 NORTH O'CONNOR BOULEVARD
IRVING, TEXAS 75039.

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Edward Vilano
Appeals Judge

CONCUR:

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Gary L. Kilgore
Appeals Judge

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Thomas A. Knapp
Appeals Judge